No. 43108-4-II

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bryan Hart,

Appellant.

Grays Harbor County Superior Court Cause No. 11-1-00422-1 The Honorable Judge Gordon Godfrey

Appellant's Reply Brief

Jodi R. Backlund Manek R. Mistry Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490 Olympia, WA 98507 (360) 339-4870 backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF	CONTENTSi		
TABLE OF	AUTHORITIESiii		
ARGUMENT5			
I.	The trial court violated the constitutional requirement that criminal trials be open and public, because experience and logic suggest that the closed proceedings in this case should have been open to the public		
II.	The trial court infringed Mr. Hart's constitutional privilege against self-incrimination		
III.	The evidence was insufficient for conviction on Count I (and the associated firearm enhancement) because the prosecution failed to establish that the firearm was operable		
IV.	The firearm enhancement was imposed in violation of Mr. Hart's right to due process and his right to a jury determination of any fact used to increase the penalty beyond the standard range		
V.	Mr. Hart's conviction for harassment violated his First Amendment right to free speech and his Fourteenth Amendment right to due process		
VI.	Mr. Hart's conviction for harassment violated his right to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. Article I. Section 22 15		

VII.	Amendment right to the effective assistance of counsel			
CONCLUSI	ON			

TABLE OF AUTHORITIES

FEDERAL CASES Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010)4 Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 **WASHINGTON STATE CASES** State v. Bone-Club, 128 Wash.2d 254, 906 P.2d 325 (1995) 4, 5, 6, 9 State v. Epefanio, 156 Wash. App. 378, 234 P.3d 253 reconsideration denied, review denied, 170 Wash.2d 1011, 245 P.3d 773 (2010) 9, 10

denied, 170 Was	1.1	•	, ,	
State v. Recuenco,	163 Wash.2d 42	28, 180 P.3d	1 1276 (2008)	11, 12
State v. Schaler, 16	59 Wash.2d 274,	, 236 P.3d 8	58 (2010)	12, 13, 14
State v. Sublett,	_ Wash.2d,	P.3d	(2012)	4, 5, 7, 8
State v. Watt, 160 V	Wash.2d 626, 16	60 P.3d 640	(2007)	10
CONSTITUTIONAL	Provisions			
U.S. Const. Amend	i. I			12, 13
U.S. Const. Amend	1. VI			9, 14
U.S. Const. Amend	1. XIV			9, 12, 14
Wash. Const. Artic	ele I, Section 10.			9
Wash. Const. Artic	ele I, Section 22.			9, 14
WASHINGTON STA	<u>ATUTES</u>			
RCW 9.41.040				11
OTHER AUTHORIT	<u> TIES</u>			
Deming v. State, 23	35 Ind. 282, 133	N.E.2d 51	(1956)	8
Kirk v. State, 14 O	hio 511 (1846)			8
Plunkett v. Appleto	on, 51 How. Pr. 4	469 (N.Y. 1	876)	8
Sargent v. Roberts,	, 18 Mass. 337 (1823)		8
State v. Smith. 6 R.	.I. 33 (1859) (Sr	nith II)		8

ARGUMENT

I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC, BECAUSE EXPERIENCE AND LOGIC SUGGEST THAT THE CLOSED PROCEEDINGS IN THIS CASE SHOULD HAVE BEEN OPEN TO THE PUBLIC.

Criminal cases must be tried openly and publicly. State v. Bone-Club, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); Presley v. Georgia, 558 U.S. 209, ____, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (per curiam). Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. Bone-Club, at 258-259.

The public trial right attaches to a particular proceeding when "experience and logic" show that the core values protected by the right are implicated. State v. Sublett, ___ Wash.2d ___, ___, __ P.3d ___ (2012). A reviewing court first asks "whether the place and process have historically been open to the press and general public," and second, "whether public access plays a significant positive role in the functioning of the particular process in question." Id, at ___ (quoting Press—Enterprise Co. v. Superior Court, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). If the place and process have historically been open

and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under Bone-Club.

As the Supreme Court noted, "[t]the resolution of legal issues is quite often accomplished during an adversarial proceeding..." Sublett, at ____. Traditionally, adversarial proceedings have been open to the public. See, e.g., Press-Enterprise at 13 (addressing preliminary hearing in California); United States v. Simone, 14 F.3d 833 (3d Cir. 1994) (granting public access to post-trial examination of juror for misconduct); United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986) (Smith I) (granting public access to transcripts of sidebar and in camera rulings); United States v. Criden, 675 F.2d 550, 552 (3d Cir. 1982) (granting public access to transcript of pretrial hearing held in camera). By contrast, the public trial right is less likely to attach to ex parte or nonadversarial matters. See, e.g., In re Search of Fair Finance, 692 F.3d 424, 430 (6th Cir. 2012) (refusing public access to search warrant documents); United States v. Gonzales, 150 F.3d 1246, 1257 (10th Cir. 1998) (refusing public access to indigent defendants' ex parte requests for public funds).

The Supreme Court has yet to allocate the burden of proof when it comes to showing what occurred during a closed in camera proceeding.

However, the Court has provided some guidance: where the record shows the likelihood of a closure (in the form of "the plain language of the trial

court's ruling impos[ing] a closure"), the burden shifts to the state "to overcome the strong presumption" that a closure actually occurred. State v. Brightman, 155 Wash.2d 506, 516, 122 P.3d 150 (2005).

Similarly, the state should bear the burden of establishing that a closed proceeding does not implicate the core values of the open trial right. The prosecutor has an incentive to ensure that verdicts are upheld, and is therefore the natural candidate to bear responsibility for putting on the record anything that transpired during a closed proceeding.¹

Here, the record shows that the judge and counsel met twice behind closed doors to discuss jury instructions—once on the afternoon of January 11th, and again on the morning of January 12th. RP (1/11/12 p.m.) 70-72; RP (1/12/12) 61. The court had hoped to work out the instructions during the first meeting; however, there apparently remained issues to be resolved, necessitating a second meeting on the following morning:

Now, gentlemen, I've given you and I've been editing in the back and etcetera, etcetera, etcetera. I have given you a very rough draft of proposed jury instructions. I had hoped we could get this to the jury today, but I now have another instruction submitted, and I don't think we're going to get to the jury today. So therefore I think I'm going to have the jury brought in. I will instruct them to be here tomorrow morning at 9 o'clock ready to go, and we will proceed from there. And I would like you gentlemen here

7

¹ Similarly, if a closed proceeding does implicate the core values of the public trial right, the prosecution should ensure that the court considers the five Bone-Club factors.

tomorrow about a quarter after 8:00 so we can take care of business.

RP (1/11/12) 71 (emphasis added).

Contrary to Respondent's assertion, the in camera meeting involved more than merely the format of the instructions,² as the afternoon meeting involved "another instruction submitted" (presumably by one of the parties), and apparently took significantly longer than the 10-15 minutes originally anticipated. RP (1/11/12) 70-72. Indeed, the judge told jurors he wouldn't be able to finish even after another hour, and he allocated 45 minutes to meet with counsel the following morning. RP (1/11/12) 70-72.

The transcript does not indicate what occurred in chambers; nor is there any record of the instructions submitted by either party. None of the arguments made by either party are preserved, nor are any rulings made by the trial judge. Indeed, as Respondent notes, "[n]othing else in the record clarifies what was said at this meeting." Brief of Respondent, p. 3. Accordingly, the state failed to establish that the proceeding did not implicate the core values of the public trial right. Cf Sublett, at ____ ("There was no showing here that the chambers discussion was adversarial

² Brief of Respondent, p. 3.

³ According to the docket, no proposed instructions were filed with the court.

in that it seems all sides agreed with the judge's response.") Ultimately, neither party took exception to the court's instructions; however, there is no indication as to how consensus was reached. See RP (1/12/12) 61.

Given the length of time spent on the instructions and the lack of proof to the contrary, it is fair to presume that the in camera proceedings had an adversarial tone. Under these circumstances, the "experience" prong of the Sublett test suggests that the closed hearings here should have been open to the public. This is especially true in light of the public's longstanding interest in the court's instructions on the law. See, e.g., Deming v. State, 235 Ind. 282, 286, 133 N.E.2d 51 (1956); Plunkett v. Appleton, 51 How. Pr. 469 (N.Y. 1876); State v. Smith, 6 R.I. 33, 36 (1859) (Smith II); Sargent v. Roberts, 18 Mass. 337, 349 (1823); Kirk v. State, 14 Ohio 511 (1846).

Similarly, the "logic" prong weights in favor of public access to in camera proceedings such as those conducted here. Open court proceedings are essential to proper functioning of the judicial system; this is especially true for hearings that have an adversarial tone, or for those that offer a possibility of prejudice to either party. Opening the courtroom doors to the public promotes public understanding of the judicial system, encourages fairness, provides an outlet for community sentiment, ensures public confidence that government (including the judiciary) is free from

corruption, enhances the performance of participants, and discourages perjury. See Criden, at 556 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). Each of these benefits accrues when the public, the press, and any interested parties have a full opportunity to observe every aspect of a proceeding.

The in camera hearings here implicated the core values of the public trial right. Accordingly, the trial court's decision to close the courtroom violated both Mr. Hart's constitutional rights and those of the public. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; Bone-Club, supra. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

II. THE TRIAL COURT INFRINGED MR. HART'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION.

An accused person who testifies at trial does not forfeit her or his privilege against self-incrimination as to all matters. Instead, by choosing to testify, the accused waives the privilege only as to matters raised in direct or redirect examination. State v. Epefanio, 156 Wash. App. 378, 389, 234 P.3d 253 reconsideration denied, review denied, 170 Wash.2d 1011, 245 P.3d 773 (2010). Here, Mr. Hart testified about the alleged assault on law enforcement, not about his relationship with Ms. Hargrove. RP (1/11/12 p.m.) 62-64.

Cross-examination should have been limited to the assault charge or matters bearing on credibility. Instead, the prosecutor was allowed (over objection) to cross-examine about Mr. Hart's relationship with Ms. Hargrove and the texts he'd allegedly sent. RP (1/11/12 p.m.) 64-68. This was error, and is presumed prejudicial. Epefanio, at 389; State v. Watt, 160 Wash.2d 626, 635, 160 P.3d 640 (2007).

Respondent suggests the text messages proved that Mr. Hart "was fully aware who was knocking on his door and why they were there." Brief of Respondent, p. 4. This is incorrect. It makes little sense to suppose that a person awakened at 3:00 a.m. will connect the presence of armed men outside his door to text messages he sent to his girlfriend two days earlier. The link is too tenuous, and should not have overcome Mr. Hart's constitutional privilege. Epefanio, at 389.

Nor can Respondent establish that the error was harmless beyond a reasonable doubt. For example, jurors may have drawn negative conclusions regarding Mr. Hart's credibility from what Respondent describes as "self serving" responses. Brief of Respondent, p. 5. This may well have influenced their view of the evidence on both charges. Accordingly, Respondent cannot establish that the error was harmless beyond a reasonable doubt. Watt, at 635.

III. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON COUNT I (AND THE ASSOCIATED FIREARM ENHANCEMENT) BECAUSE THE PROSECUTION FAILED TO ESTABLISH THAT THE FIREARM WAS OPERABLE.

A firearm enhancement may only be imposed if the prosecution proves beyond a reasonable doubt that the offender was armed with an operable firearm. State v. Recuenco, 163 Wash.2d 428, 437, 180 P.3d 1276 (2008); State v. Pierce, 155 Wash. App. 701, 714-15, 230 P.3d 237 (2010). Here, the prosecution provided testimony that the gun looked functional, but did not prove operability beyond a reasonable doubt. RP (1/11/12 p.m.) 43. Accordingly, the evidence was insufficient to prove the firearm enhancement. Pierce, at 714-715.

Respondent does not address the sufficiency of the evidence to establish the firearm enhancement. Respondent's silence on this point may be treated as a concession. See In re Pullman, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009). The enhancement must be vacated, and the case remanded for correction of the judgment and sentence. Id.

The Court of Appeals has taken the position that proof of operability is not required for conviction of a substantive offense. See, e.g., State v. Raleigh, 157 Wash. App. 728, 734, 238 P.3d 1211 (2010) review denied, 170 Wash.2d 1029, 249 P.3d 624 (2011) (interpreting RCW 9.41.040). It is not clear why a firearm must be operable in order

for an enhancement to apply, but need not be operable when its possession or use is an element of an offense. The Supreme Court has yet to address this issue.

Assuming that the Supreme Court will adopt an approach consistent with Recuenco, the evidence here was insufficient to prove that Mr. Hart assaulted Officer Blodgett with a deadly weapon. Recuenco, supra. Accordingly, the conviction on Count I must be reversed and the charge dismissed with prejudice. Smalls v. Pennsylvania, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

IV. THE FIREARM ENHANCEMENT WAS IMPOSED IN VIOLATION OF MR. HART'S RIGHT TO DUE PROCESS AND HIS RIGHT TO A JURY DETERMINATION OF ANY FACT USED TO INCREASE THE PENALTY BEYOND THE STANDARD RANGE.

Mr. Hart stands on the argument set forth in Appellant's Opening Brief.

V. MR. HART'S CONVICTION FOR HARASSMENT VIOLATED HIS FIRST AMENDMENT RIGHT TO FREE SPEECH AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A conviction for harassment may only be premised upon a "true threat." State v. Schaler, 169 Wash.2d 274, 283-284, 236 P.3d 858 (2010). A true threat "is 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to

inflict bodily harm upon or to take the life of another person." Id, (citations omitted). The instructions here did not include this definition; accordingly, Mr. Hart's conviction must be reversed and the charge remanded for a new trial with proper instructions. Id.

Respondent erroneously claims that the instructions included the required language. Brief of Respondent, p. 9. The language quoted by Respondent⁴ is not the "true threat" language. In one sense, it imposes a higher burden upon the state (by requiring proof of actual knowledge); however, it misses the mark, because it allows conviction based on Mr. Hart's subjective state of mind, even if a reasonable speaker in his position would not foresee that his statements would be interpreted as a serious expression of intent to cause harm. Cf. Schaler, supra.

The court's obligation was to make the relevant standard—in this case the objective standard required under the First Amendment—manifestly clear to the average juror. State v. Kyllo, 166 Wash.2d 856, 864, 215 P.3d 177 (2009). The instructions substituted a subjective standard for the objective standard. Schaler, supra.

⁴ "[T]hat he 'knew that his words or conduct would place Jennifer Hargrove in reasonable fear that the threat to kill would be carried out." Brief of Respondent, p. 9 (quoting Instruction No. 14).

Respondent does not attempt to argue that the error was harmless. Respondent's failure to address harmlessness may be treated as a concession. Pullman, at 212 n.4. Accordingly, Mr. Hart's harassment conviction must be reversed and the case remanded for a new trial with proper instructions. Schaler, supra.

VI. MR. HART'S CONVICTION FOR HARASSMENT VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 22.

Mr. Hart stands on the argument set forth in Appellant's Opening Brief.

VII. MR. HART WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Hart stands on the argument set forth in Appellant's Opening Brief.

CONCLUSION

Mr. Hart's convictions must be reversed and the charges dismissed. In the alternative, the case must be remanded for a new trial, or for sentencing without the firearm enhancement.

Respectfully submitted on December 24, 2012,

BACKLUND AND MISTRY

\dilballuk

Jodi R. Backlund, WSBA No. 22917

Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922

Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Bryan Hart, DOC #789790 Cedar Creek Correctional Center P.O. Box 37 Little Rock, WA 98556-0037

And to:

Grays Harbor County Prosecuting Attorney 102 W Broadway Ave Rm 102 Montesano, WA, 98563-3621

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 24, 2012.

Jodi R. Backlund, WSBA No. 22917

Attorney for the Appellant

Milballurk

BACKLUND & MISTRY

December 24, 2012 - 4:25 PM

Transmittal Letter

Document Upload	ded: 431084-Reply Brief.pdf			
Case Name: Court of Appeals	State v. Bryan Hart Case Number: 43108-4			
Is this a Personal Restraint Petition? Yes No				
The document being Filed is:				
Designa	stion of Clerk's Papers Supplemental Designation of Clerk's Papers			
Statem	ent of Arrangements			
Motion:	<u> </u>			
Answer	/Reply to Motion:			
Brief: _	Reply			
Statem	Statement of Additional Authorities			
() Cost Bil	Cost Bill			
Objection				
Affidavi				
Letter				
	Copy of Verbatim Report of Proceedings - No. of Volumes: Hearing Date(s):			
Persona	Personal Restraint Petition (PRP)			
Respon	Response to Personal Restraint Petition			
Reply to	Reply to Response to Personal Restraint Petition			
Petition	Petition for Review (PRV)			
Other:	Other:			
Comments: No Comments were entered.				

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com